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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

STATE OF MISSOURI
Petitioner,

vs.

KURT ZANCAUSKE,
Respondent.

Petition for Writ of Certiorari to the
Missouri Court of Appeals, Southern District

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether law enforcement officers, when interviewing a suspect who voluntarily appears at the police station, who is not formally arrested or restrained in any manner, and who is told that he is not under arrest and will be free to leave regardless of the outcome of the questioning, are nevertheless required to advise the suspect of his *Miranda* rights once the officers develop evidence which constitutes probable cause to arrest the suspect?

2. Whether the decision of the Missouri Court of Appeals, holding that *Miranda* warnings must be administered to a suspect once law enforcement officers develop evidence that provides "reasonable grounds for [his] arrest," even though the suspect "had been told at the outset of the interrogation that he was not under arrest and was free to leave regardless of the outcome of the interrogation," is consistent with *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966), or with subsequent decisions of this Court construing that holding, specifically, *California v. Beheler*, 463 U.S. 1121, 103 S. Ct. 3517, 77 L.Ed.2d 1275 (1983), *Oregon v. Mathiason*, 429 U.S. 492, 97 S. Ct. 711, 50 L.Ed.2d 714 (1977), and *Beckwith v. United States*, 425 U.S. 341, 96 S. Ct. 1612, 48 L.Ed.2d 1 (1976), which hold that it is the compulsive aspect of custodial interrogation, not the content or strength of the government's suspicions, that triggers the need for *Miranda* warnings?

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

On March 7, 1991, the Missouri Court of Appeals, Southern District, affirmed an order of the trial court suppressing the respondent's statements to sheriff's deputies in the case styled *State of Missouri v. Kurt Zancauske*, No. 17,115. The opinion is now reported at *State v. Zancauske*, 804 S.W.2d 851 (Mo. App., S.D. 1991), and has been reproduced, in its entirety, in Appendix A of this petition.

JURISDICTIONAL STATEMENT

This petition seeks review of the decision of the Missouri Court of Appeals, Southern District, issued on March 7, 1991. *State of Zancauske*, 804 S.W.2d 851 (Mo. App., S.D. 1991) (Reprinted in Appendix A, *infra*).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3), 28 U.S.C. § 2101(d), and Rule 13.1 of this Court. Pursuant to Rule 13.1 of this Court, the petitioner's petition, which seeks review of a decision of the Missouri Court of Appeals, "a court of last resort," has been filed "within 90 days after the entry of the judgment" of March 7, 1991.

CONSTITUTIONAL PROVISION INVOLVED

Amendment V, U. S. Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTORY PROVISIONS INVOLVED

The statute under which the respondent was charged, § 569.170, RSMo 1986, is set forth in full under Appendix B, *infra*, of this petition. The statute authorizing the State to appeal from the trial court's order sustaining the respondent's pretrial motion to suppress, § 547.200, RSMo 1986 is set out, in pertinent part, in Appendix C, *infra*, of this petition.

STATEMENT OF THE CASE

A. Procedural History

The respondent, Kurt Zancauske,[1] was charged by an information filed in the Circuit Court of Phelps County, Missouri, 25th Judicial Circuit, with burglary in the second degree in violation of § 569.170, RSMo (1986). *State v. Zancauske*, 804 S.W.2d 851, 852 (Mo. App., S.D. 1991). Prior to his scheduled trial, the respondent filed a motion seeking to suppress certain written statements he had made to the Phelps County sheriff's department during questioning at that office which took place on March 14, 1989. *Id.*, 804 S.W.2d at 852.

Following an evidentiary hearing, the trial court sustained the motion, *id.*, ruling that the sheriff's deputies were required to have advised the respondent of the rights afforded him by *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966), once a suspected accomplice, who was being questioned separately but simultaneously by other sheriff's deputies, implicated the respondent in the burglary and theft. *State v. Zancauske, supra*, 804 S.W.2d at 854.

The State perfected an interlocutory appeal pursuant to § 547.200, RSMo, *id.*, 804 S.W.2d at 852, and on March 7, 1991, the Missouri Court of Appeals, Southern District, upheld the trial court's order suppressing the respondent's statements. *Id.*, 804 S.W.2d at 851.

The Court of Appeals agreed with the trial judge's determination that *Miranda* warnings were required once the deputies were told by the other suspect that the respondent had been involved in the crimes. The Court of Appeals held that when the other suspect admitted the crimes and implicated the respondent "the

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[1] Since the only two parties to this proceeding are listed in the caption of this case, a separate "Parties to the Proceeding" section has not been included in this petition pursuant to Rule 14.01(b) of this Court.

evidence law enforcement officers had developed constituted reasonable grounds for arrest." *Id.*, 804 S.W.2d at 859.

"At that point," the appeals court ruled, "the interrogation became custodial notwithstanding that [the respondent] had been told at the outset of the interrogation that he was not under arrest and was free to leave regardless of the outcome of the interrogation." *Id.* Therefore, the court concluded, "[i]t was then that the Miranda warning was required." *Id.*

B. Statement of Facts

The facts underlying this petition are not in dispute, and may be gleaned from the opinion of the Missouri Court of Appeals, Southern District, affirming the order granting the respondent's motion to suppress:

In the course of investigating a reported burglary and stealing that had occurred in Phelps County, Missouri, Phelps County sheriff's deputies learned that the respondent and another man, Joe Dvorak, had been in the vicinity where the offenses occurred. *State v. Zancauske, supra*, 804 S.W.2d at 853. The respondent and Dvorak had been cutting timber on a tract of land in the area where the burglary and stealing took place, at about the same time that the offenses occurred. *Id.*

The respondent's interrogation was conducted in a room at the sheriff's offices identified as the "deputy's room." *Id.* The deputy's room was located on the west side of the building. The doorway into the room was by an open hallway that led to the front door of the building. *Id.* It also was accessible from an east entrance to the sheriff's department through a communications room. The interrogation lasted about one and one-half hours. *Id.*

The respondent was not arrested. He was not in handcuffs, nor was he restrained from leaving the sheriff's offices. *Id.* Prior to being questioned, the respondent was told that he was not under

arrest, and that he would be allowed to leave the sheriff's office " 'regardless of how the interview came out.' " *Id.* The door that separated the deputy's room from the hallway was not locked, and the respondent was allowed to leave when the interview was over. *Id.*

Dvorak also was at the sheriff's office on the evening of March 14, 1989. *Id.* The respondent and Dvorak were questioned contemporaneously, but separately. *Id.* At no time during the questioning was the respondent advised of his *Miranda* rights. *Id.*

During the course of the interrogation, the respondent was told that Dvorak had confessed to the crimes and that he had implicated the respondent. *State v. Zancauske, supra,* 804 S.W.2d at 854. The respondent then gave a written statement in which he admitted being at the scene of the crimes, but denied going into the building that was burglarized. *Id.* However, following further conversations with the deputies, the respondent admitted entering the premises, but denied taking anything. *Id.*

As noted under subsection A, *supra*, both the trial court, and the Missouri Court of Appeals, ultimately concluded that, even though the respondent had appeared at the station voluntarily, was aware that he was not under arrest and was free to leave at any time, the respondent nevertheless was "in custody" for purposes of *Miranda* once Dvorak, the suspected accomplice, implicated the respondent in the commission of the crimes. *State v. Zancauske, supra*, 804 S.W.2d at 859[3].

REASONS FOR GRANTING THE WRIT

I.

THE OPINION OF THE COURT OF APPEALS, CONCLUDING THAT THE FIFTH AMENDMENT REQUIRES LAW ENFORCEMENT OFFICERS TO ADMINISTER *MIRANDA* WARNINGS TO A SUSPECT ONCE THEY DEVELOP PROBABLE CAUSE TO ARREST HIM, EVEN THOUGH THE SUSPECT "HAD BEEN TOLD AT THE OUTSET OF THE INTERROGATION THAT HE WAS NOT UNDER ARREST AND WAS FREE TO LEAVE REGARDLESS OF THE OUTCOME" OF THE QUESTIONING, IS WHOLLY INCONSISTENT WITH THE *MIRANDA* DECISION, AND DIRECTLY CONTRARY TO *CALIFORNIA v. BEHELER*, 463 U.S. 1121 (1983), and *OREGON v. MATHIASON*, 429 U.S. 492 (1977), WHERE, ON IDENTICAL FACTS, THIS COURT HELD THAT A SUSPECT WHO VOLUNTARILY APPEARS AT A POLICE STATION FOR QUESTIONING, IS NOT FORMALLY ARRESTED OR RESTRAINED IN ANY MANNER, AND IS ALLOWED TO LEAVE FOLLOWING THAT INTERVIEW, IS NOT "IN CUSTODY" FOR PURPOSES OF *MIRANDA*.

The facts of this case, as well as the constitutional question they present, will no doubt seem familiar to this Court.

The facts are not complex: A suspect, whom the police wish to question concerning a criminal offense, is asked to come down to the police station for an interview. He agrees, and furnishes his own transportation to the station. When he arrives there, he is reminded that he is not under arrest, and his freedom of movement is not restrained in any manner during the interview that follows. When the questioning is over, the suspect leaves the station unhindered.

The constitutional question is just as simple: Since the questioning takes place at the police station, and the investigation has, at least to some degree, "focused" on the suspect, is the suspect "in custody" for purposes of *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966), so that the failure of police to administer the warnings required by the *Miranda* decision requires the suppression of his statements?

The Missouri Court of Appeals answered the constitutional question in the affirmative, holding that the Fifth Amendment requires that *Miranda* warnings be administered to a suspect once law enforcement officers develop evidence that provides "reasonable grounds for [his] arrest," even though the suspect was not subjected to any of the restraints normally associated with an arrest, and "had been told at the outset of the interrogation that he was not under arrest and was free to leave regardless of the outcome of the interrogation." *State v. Zancauske*, 804 S.W.2d 851, 859[3] (Mo. App., S.D. 1991). Despite the absence of any formal restraints on the respondent's freedom, the court in *Zancauske* determined that the questioning became "custodial" once the sheriff's deputies had probable cause to arrest. It was at that point, the court reasoned, at which " 'police [could] be expected to pursue the case against the defendant with vigor' " and so it "was then that the Miranda warning was required." *State v. Zancauske, id.*

This distorted view of *Miranda* is wholly inconsistent with that decision and simply cannot be squared with either *California v. Beheler*, 463 U.S. 1121, 103 S. Ct. 3517, 77 L.Ed.2d 1275 (1983), or *Oregon v. Mathiason*, 429 U.S. 492, 97 S. Ct. 711, 50 L.Ed.2d 714 (1977), both of which reached the opposite conclusion on virtually identical facts.

In *Miranda*, of course, this Court held that a person subjected to "custodial interrogation" must be advised of his Fifth Amendment rights prior to questioning, and defined the term "custodial

interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda v. Arizona, supra,* 384 U.S. at 444, 86 S. Ct. at 1612[3-4].

Almost 11 years later in *Oregon v. Mathiason, supra,* this Court had occasion to consider the applicability of *Miranda* to police station questioning where the suspect had appeared at the station voluntarily, was not placed under arrest, and left the station voluntarily at the conclusion of the interview. It concluded that *Miranda* did not apply, because the defendant "was not in custody 'or otherwise deprived of his freedom of action in any significant way.' " *Oregon v. Mathiason, supra,* 429 U.S. at 495, 97 S. Ct. at 714.

The police had initiated contact with Mathiason, who agreed to come to the police station. When he arrived at the police station, he was told he was not under arrest. The police then questioned Mathiason about a burglary, after telling him that they suspected his involvement in the crime and that the truthfulness of any statements that he might make would be evaluated by a prosecutor or a judge. The officer also falsely told him that his fingerprints were found at the scene of the break-in. Mathiason then admitted his participation in the crime. At that point, the officer advised Mathiason of his *Miranda* rights, and took a taped confession, but released him pending the district attorney's decision to prosecute. The interview lasted 30 minutes. *Oregon v. Mathiason, supra,* 429 U.S. at 493-494, 97 S. Ct. at 713.

In concluding that the police were not required to advise Mathiason of his *Miranda* rights prior to questioning, this Court stated as follows:

> In the present case . . . there is no indication that the questioning took place in a context where respondent's freedom to depart was restricted in any way. He came

> voluntarily to the police station, where he was immediately informed that he was not under arrest. At the close of a 1/2-hour interview respondent did in fact leave the police station without hindrance. It is clear from these facts that Mathiason was not in custody "or otherwise deprived of his freedom of action in any significant way."

Oregon v. Mathiason, supra, 429 U.S. at 495, 97 S. Ct. at 714.

This Court further emphasized that "police officers are not required to administer *Miranda* warnings to everyone whom they question," and that "[n]or is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect." *Id.* This Court went on to state:

> *Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him "in custody." It was *that* sort of coercive environment to which *Miranda* by its terms was made applicable, and to which it is limited.

Id. (court's emphasis.)

Six years later this Court was forced to repeat itself in *California v. Beheler*. In *Beheler* the police were investigating a botched robbery attempt that resulted in the death of the intended robbery victim. Beheler told the police at the scene that several of his companions were involved, and later that evening he "voluntarily agreed to accompany police to the station house, although the police specifically told Beheler that he was not under arrest." *Id.*, 463 U.S. at 1122, 103 S. Ct. at 3518.

At the station house, Beheler agreed to talk to the police about the murder; neither prior to, nor during this interview was Beheler advised of his *Miranda* rights. The interview lasted 30 minutes. At the conclusion of the officers' questioning, Beheler was told that his statement would be evaluated by the prosecutor's

office and he was then allowed to return home. Five days later he was arrested in connection with the murder and, after being fully advised of his *Miranda* rights, he gave a second, taped confession to police. *Id.*

This Court ruled that Beheler's statements at the police station on the night of the murder were admissible, despite the lack of *Miranda* warnings, since Beheler "was neither taken into custody nor significantly deprived of his freedom of action." *Id.*, 463 U.S. at 1123, 103 S. Ct. at 3519. This Court reiterated its holding in *Mathiason* that "the ultimate inquiry is simply whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest," and "that *Miranda* warnings are not required 'simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect.' " *Id.*, 463 U.S. at 1125, 103 S. Ct. at 3520[2-3].

Beheler and *Mathiason* clearly are dispositive of the issue presented by this petition. As in those cases, the respondent voluntarily went to the sheriff's office, and, as in *Mathiason*, he even used his own car. As in *Beheler* and *Mathiason*, he was immediately informed that he was not under arrest, and he was not restrained or prevented from leaving the sheriff's office at any point during the questioning. And, as in *Beheler* and *Mathiason* , he was allowed to leave unhindered after the interview was concluded. *State v. Zancauske, supra*, 804 S.W.2d at 853-854.

Indeed, the only significant differences between this case and *Beheler* and *Mathiason*, are not favorable to the respondent: In the present case, prior to questioning, the sheriff's deputies who interviewed the respondent expressly told him " 'that he'd be leaving regardless of how the interview came out.' " *State v. Zancauske, supra*, 804 S.W.2d at 853. And, unlike *Mathiason*, where the police *falsely* told the suspect that they had evidence

(his fingerprints) linking him to the burglary, here the sheriff's deputies *truthfully* informed the respondent that his alleged accomplice had implicated him in the burglary. *State v. Zancauske, supra*, 804 S.W.2d at 854.

But, although the Missouri Court of Appeals cited and discussed both *Mathiason* and *Beheler* at considerable length in its opinion, *State v. Zancauske, supra*, 804 S.W.2d at 855-858, it somehow came to the astonishing conclusion that those cases were not controlling. The Court of Appeals first opined that it was "difficult to apply the language of *Beheler* and *Mathiason*" to the facts of the case because the deputies, at the time they questioned the respondent, were primarily interested in recovering the stolen property rather than arresting those involved in the crimes. *Id.*, 804 S.W.2d at 858.

Next, the court ruled that the case was distinguishable from *Mathiason* and *Beheler* because (1) in both of those cases the questioning took 30 minutes or less, compared to the 90-minute interview of the respondent, and (2) in both *Mathiason* and *Beheler* the suspects were given their *Miranda* warnings once the police developed probable cause to arrest. *Id.*, 804 S.W.2d at 857, 858. The court then quoted with approval from Justice Marshall's dissenting opinion in *Mathiason*, where he had suggested that the police should not be allowed to evade *Miranda* by deliberately postponing the timing of the official "arrest" until after they had obtained incriminating statements from an unwarned suspect. *Id.*, 804 S.W.2d at 858.

To begin with, it is difficult to divine the meaning of the court's statement that the decisions in *Beheler* and *Mathiason* are "difficult to apply" simply because the immediate priority of the sheriff's deputies was to recover the property stolen in the burglary, rather than "to bring criminal charges against the guilty parties." *State v. Zancauske, supra,* 804 S.W.2d at 858. If anything, the deputies' apparent disinterest in arresting the

thieves merely provides additional evidence that the questioning of the respondent occurred in a noncustodial setting.

And, although the interview of the respondent took approximately one hour longer than the questioning in *Beheler* and *Mathiason*, this is a meaningless, irrelevant distinction. Since it is undisputed that the respondent volunteered to answer the officers' questions, and that he "was not physically restrained and could have left the office" at any time, the length of the interview obviously could have no bearing on the crucial issue of whether the questioning occurred in a custodial setting. *Minnesota v. Murphy*, 465 U.S. 420, 423, 104 S. Ct. 1136, 1144[8], 79 L.Ed.2d 409 (1984).

Equally irrelevant is the *Zancauske* court's discussion concerning the existence of probable cause to arrest. The court suggests that its holding is not contrary to *Beheler* or *Mathiason* because "in each of those cases, at the time the police officers focused on the respective subjects... the Miranda warnings were given before attempting to elicit further statements." *State v. Zancauske, supra*, 804 S.W.2d at 850.

This Court has, however, repeatedly emphasized that no amount of investigative "focus" on a suspect can amount to "custody" unless the suspect's freedom of movement is restricted in some significant way. *Minnesota v. Murphy, supra*, 465 U.S. at 431, 104 S. Ct. at 1144[6]; *Beckwith v. United States*, 425 U.S. 341, 346-347, 96 S. Ct. 1612, 1616, 48 L.Ed.2d 1 (1976); *California v. Beheler, supra*, 463 U.S. at 1124 n. 2, 103 S. Ct. at 3519, n. 2.

As this Court noted in *Beheler*, any notion that "focus" and "custody" were necessarily synonymous should have been put to rest in *Beckwith v. United States, supra,* in which this Court rejected the suggestion that the "in custody" requirement of *Miranda* was satisfied merely because the police interviewed a person who was the "focus" of a criminal investigation. *Beckwith*

emphasized that "*Miranda* implicitly defined 'focus,' for its purposes, as " 'questioning initiated by law enforcement officers *after* a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.' " *Beckwith v. United States, supra*, 425 U.S. at 347, 96 S. Ct. at 1616[2], quoting *Miranda v. Arizona, supra*, 384 U.S. at 444, 86 S. Ct. at 1612[4].

As previously noted, both *Beheler* and *Mathiason* clearly state that the police are not required to administer *Miranda* warnings " 'simply . . . because the questioned person is one whom the police suspect.' " *California v. Beheler, supra*, 463 U.S. at 1115, 103 S. Ct. at 3520[2-3], quoting *Oregon v. Mathiason, supra*, 429 U.S. at 495, 97 S. Ct. at 714[2]. This is true whether or not their suspicion rises to the level of probable cause; as this Court in *Beckwith* stressed, " ' " [i]t [i]s the compulsive aspect of custodial interrogation, and not the strength or content of the government's suspicions at the time the questioning [i]s conducted," ' " that triggers the need for *Miranda* warnings. *Beckwith v. United States, supra*, 425 U.S. at 346, 96 S. Ct. at 1616, quoting *United States v. Caiello*, 420 F.2d 471, 473 (2d Cir. 1969). *See also Berkemer v. McCarty*, 468 U.S. 420, 442 n. 35, 104 S. Ct. 3138, 3151 n. 35, 82 L.Ed.2d 317 (1984) (reiterating this principle).

The Missouri Court of Appeals, however, reasoned that the existence of "probable cause" must be the bright line for determining the need for *Miranda* warnings; otherwise, the court concluded, the police could "circumvent[ ]" the *Miranda* decision by deliberately postponing the official arrest until after the unwarned suspect had made incriminating statements. *State v. Zancauske, supra*, 804 S.W.2d at 858.

Such an argument, however, clearly misperceives the purpose of the *Miranda* decision and the evils it attempted to prevent. The safeguards devised by *Miranda*, as this Court has repeatedly

emphasized, were designed "to *ensure* that the police do not coerce or trick captive suspects into confessing, [and] to relieve the " 'inherently compelling pressures' " generated by the custodial setting itself." *Berkemer v. McCarty, supra*, 468 U.S. at 433, 104 S. Ct. at 3146-3147[2]. A custodial arrest "convey[s] to the suspect a message that he has no choice but to submit to the officers' will and to confess." *Minnesota v. Murphy, supra*, 465 U.S. at 433, 104 S. Ct. at 1145[8]. Moreover, "the coercion inherent in custodial interrogation derives in large measure from an interrogator's insinuations that the interrogation will continue until a confession is obtained." *Id.*

Obviously, none of these psychological pressures is present when the suspect is not "captive," when he knows he is free to leave at any time, and can terminate the questioning at will. There is, therefore, nothing inherently insidious or unfair about police investigative techniques which postpone the timing of the suspect's arrest until after they have questioned him in a relaxed, noncoercive, noncustodial setting. *Miranda*, after all, was designed to preclude the use of unreliable, coerced statements obtained by "sustained and protracted questioning incommunicado," *Miranda v. Arizona, supra*, 384 U.S. at 446, 86 S. Ct. at 1613, and simply "does not apply outside the context of the inherently coercive custodial interrogations for which it was designed." *Roberts v. United States*, 445 U.S. 552, 560, 100 S. Ct. 1358, 1364[14], 63 L.Ed.2d 622 (1980).

Consequently, the conclusion of the Missouri Court of Appeals that the sheriff's deputies were required to advise the respondent of his *Miranda* rights once "they had developed [evidence that] constituted reasonable grounds for arrest," even though the respondent "had been told at the outset of the interrogation that he was not under arrest and was free to leave regardless of the outcome of the interrogation," *State v. Zancauske*, 804 S.W.2d at 859[3], is utterly inconsistent with the true holding of *Miranda*. The decision incorrectly shifts the focus

from "the ultimate inquiry," *i.e.*, "whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest," *California v. Beheler, supra*, 463 U.S. at 1123, 103 S. Ct. at 3519[2], to the irrelevant issues of "focus," and " ' "the strength or context of the government's suspicions at the time the questioning [i]s conducted." ' " *Beckwith v. United States, supra*, 425 U.S. at 346-347, 96 S. Ct. at 1616-1617.

This ruling, if allowed to go unchallenged, also will lead to absurd results. Since the "probable cause" test applied by the Missouri Court of Appeals looks solely to the strength of the State's case at the time of the questioning, rather than the custodial setting in which the questioning occurs, the opinion logically dictates that the sheriff's deputies would have been required to have given the respondent a *Miranda* warning even if the questioning had taken place over the telephone, or by mail.

Also, if, as in *Mathiason*, the sheriff's deputies had *falsely* confronted the respondent with nonexistent "evidence" of his guilt during an earlier stage of the questioning, and the respondent had admitted his involvement in the crimes, the confession, according to the rationale used by the Missouri Court of Appeals, would not have been tainted by the lack of a *Miranda* warning, since the sheriff's deputies at that point did not have probable cause to arrest the respondent. However, since the sheriff's deputies waited until they had actual evidence of the respondent's guilt before confronting him with that proof, his resulting confession, the Missouri Court of Appeals now decides, violates the holding of *Miranda*.

It doesn't, of course. But although this Court probably believed that it had effectively debunked the "focus-equals-custody" myth when it decided *Beckwith*, then *Mathiason*, and finally *Beheler*, it is apparent from the opinion of the Missouri

Court of Appeals, that at least some state courts still have not gotten the message, and that it therefore needs repeating.[2]

Missouri may be the worst offender in this regard: Missouri appellate courts have consistently applied a three-part test to determine if an interrogation is "custodial"—(1) the existence of probable cause to arrest, (2) the focus of the interrogation, (3) the subjective intent of the police, *see State v. Sanad*, 769 S.W.2d 436, 439[2] (Mo. App., W.D. 1989); *State v. Bradley*, 670 S.W.2d 123, 126[5] (Mo. App., E.D. 1984)—that is clearly and unequivocally irrelevant to the question of custody. In *State v. Cody*, 801 S.W.2d 430, 435[4] (Mo. App., E.D. 1990), the court opined that "[c]ustodial interrogation does not begin until the police have both reasonable grounds to believe that a crime had been committed and that the defendant has committed it," and added that "at the time of the interrogation, the investigation must have focused directly on the defendant."[3]

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[2]The Missouri Court of Appeals found support for its ruling in the opinions of three other state courts, New Jersey (*State v. Micheliche*, 220 N.J. Super. 532, 533 A.2d 41 (1987)), Minnesota (*State v. Raymond*, 305 Minn. 160, 232 N.W.2d 879 (1975)), and Arizona (*State v. Tellez*, 6 Ariz. App. 251, 431 P.2d 691 (1967)), as well as the Missouri case of *State v. Pierce*, 556 S.W.2d 216 (Mo. App., Spr. D. 1977). *State v. Zancauske*, *supra*, 804 S.W.2d at 857-858.

[3]In view of the Missouri courts' intransigence on this issue, it is highly unlikely that a motion for discretionary review addressed to the Missouri Supreme Court would have been successful. However, the Missouri Attorney General would have filed such a motion if he had been aware of the decision in time to do so. This case, however, was handled in the Court of Appeals by a special prosecutor employed by Phelps County, and the Attorney General did not learn of the existence of the decision until it was reported in the April 10, 1991, edition of *The Criminal Law Reporter*. By that time, the State's right to seek discretionary review in the state Supreme Court had long since expired. *See* Mo. S. Ct. Rules 83.02, 83.03 and 84.17.

In other words, *Beckwith*'s teaching that "focus" and "probable cause" are irrelevant in determining the need for *Miranda* warnings does not appear to have sunk in. Nor, for that matter, do Missouri courts seem cognizant of the holdings of this Court that the interrogating officer's subjective intent has no bearing on the question of "custody." *Berkemer v. McCarty, supra*, 468 U.S. at 442, 104 S. Ct. at 3151[10]; *Minnesota v. Murphy, supra*, 465 U.S. at 431, 104 St. Ct. at 1144[6].

Consequently, the Missouri Court of Appeals' misguided holding that an interrogation becomes "custodial' when the police develop probable cause to arrest, although clearly an aberration of sorts, is far more common than this Court might be inclined to believe. This Court should grant the State's petition for a writ of certiorari in this case, and reiterate its holdings in *Mathiason* and *Beheler*, even if it is only by a brief *per curiam* opinion.

CONCLUSION

Despite this Court's pronouncements in *California v. Beheler*, 463 U.S. 1121, 103 S. Ct. 3517, 77 L.Ed.2d 1275 (1983), and *Oregon v. Mathiason*, 429 U.S. 492, 97 S. Ct. 711, 50 L.Ed.2d 714 (1977), that *Miranda* warnings are not required where a defendant, although a suspect, is not placed under arrest, is at the police station voluntarily, and is allowed to leave unhindered following questioning, state courts continue to have great difficulty accepting this simple proposition. In the present case, the Missouri Court of Appeals declined to follow *Beheler* and *Mathiason*, and concluded that an interrogation "bec[o]me[s] custodial" at the point where law enforcement officers develop evidence amounting to probable cause to arrest the suspect, even though he is "not under arrest and [i]s free to leave regardless of the outcome of the interrogation." *State v. Zancauske*, 804 S.W.2d 851, 859[3] (Mo. App., S.D. 1991).

This Court has, however, repeatedly held that the mere fact that an investigation has focused on a subject does not trigger the need for *Miranda* warnings in noncustodial settings, *Minnesota v. Murphy*, 465 U.S. 420, 431, 104 S. Ct. 1136, 1144[6], 79 L.Ed.2d 409 (1984), and that it is the compulsive aspect of custodial interrogation, rather than " ' "the strength or content of the government's suspicions at the time the questioning was conducted," ' " that triggers the need for *Miranda* warnings. *Beckwith v. United States*, 425 U.S. 341, 346-347, 96 S. Ct. 1612, 1616, 48 L.Ed.2d 1 (1976).

This Court's writ of certiorari should issue to correct this misguided, palpably erroneous extension of *Miranda*.

Respectfully submitted,

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APPENDIX

APPENDIX A

MISSOURI COURT OF APPEALS
Southern District
Division Two

No. 17115

STATE OF MISSOURI,
Plaintiff-Appellant

vs.

KURT ZANCAUSKE,
Defendant-Respondent

APPEAL FROM THE CIRCUIT COURT
OF PULASKI COUNTY

Honorable Jon S. Hutcheson, Judge

AFFIRMED

Kurt Zancauske (defendant) is defendant in a criminal case pending in the Circuit Court of Pulaski County.[1] He is charged with burglary in the second degree. § 569.170.[2] Defendant, by a written motion, moved to suppress "any written statements allegedly made by defendant to any officers of the Phelps County Sheriff's Department on or about March 13, 1989." Following an evidentiary hearing, the trial court sustained the motion. The State of Missouri appeals that ruling as permitted by § 547.200. This court affirms.

Although this is "an interlocutory appeal," § 547.200.3, the state has attempted to inject for determination an additional issue

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[1] Defendant's case originated in the Circuit Court of Phelps County. It was transferred to Pulaski County on change of venue.

[2] References to statutes are to RSMo 1986 unless otherwise stated.

to that presented by defendant's written motion to suppress evidence. That additional issue relates to an evidentiary ruling made during the court of a trial of this case that ended in mistrial due to a deadlocked jury. Objections to certain oral statements allegedly made by defendant were made at trial, together with an "oral motion to suppress" those statements. The trial court sustained that objection and sustained the "oral motion to suppress." The state seeks to appeal the trial court's ruling as to those oral statements. However, defendant correctly contends that the state has no right to appeal that matter for the reason that no such appeal is authorized by statute.

Section 547.200 permits the state to file an interlocutory appeal from "any order or judgment the substantive effect of which results in: (1) Quashing an arrest warrant; (2) Suppressing evidence; or (3) Suppressing a confession or admission." The Eastern District of this court has held that the suppression of evidence referred to in § 547.200 "relates to those matters properly raised by motion as authorized in Section 542.296, RSMo. 1978." *State v. Holzschuh*, 670 S.W.2d 184, 185 (Mo. App. 1984).

Section 542.296[3] requires motions to suppress to be in writing and to be made before commencement of trial unless a defendant was unaware of the grounds for the motion before trial or had no opportunity to file the motion to suppress before trial. § 542.296.2 and .3. The state's attempt to appeal the trial court's stated ruling with respect to any oral statements made by defendant fails. "The state may appeal in criminal cases only as provided in section 547.200." *State v. Holzschuh, supra.* The only issue to be addressed is whether the trial court erred in denying defendant's written motion to suppress written statements.

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[3] § 542.296, RSMo 1986, is unchanged from § 542.296, RSMo 1978.

In reviewing the trial court's order sustaining defendant's motion to suppress, the facts and inferences that may be gleaned from the record are to be stated favorably to the ruling that is challenged on appeal. *State v. Blair*, 691 S.W.2d 259, 260 (Mo. banc 1985). "The correctness of the trial court's decision is measured by whether the evidence is sufficient to sustain the findings." *State v. Woods*, 790 S.W.2d 253, 254 (Mo. App. 1990).

In the course of investigating a reported burglary and stealing that occurred in Phelps County, deputy sheriffs learned that defendant and another man, Joe Dvorak, had been in the vicinity where the offenses occurred. Defendant and Dvorak had been cutting timber on a tract of land near the property where the burglary and stealing took place. They had been cutting timber at that location about the time of the offenses.

At the evidentiary hearing on defendant's written motion to suppress, only one witness testified — John Blair. He had previously been employed as a deputy sheriff and, in that capacity, had participated in the interrogation of defendant on the occasion when the written statement that defendant sought to suppress was given. That interrogation took place March 14, 1989, at the Phelps County Sheriff's Office. Another deputy sheriff had participated in the interrogation, but did not testify at the motion to suppress hearing. Blair testified that the other deputy had talked to defendant "at least a couple times" prior to March 14. However, the evening of March 14 was the first time Blair had talked with defendant. Blair gave no explanation regarding what caused defendant to be at the sheriff's office the evening of March 14, 1989, other than stating that defendant had been asked to be there by the other deputy sheriff. Blair was asked by the assistant prosecuting attorney, "And I take it then that he came of his own free will? He wasn't escorted to the sheriff's department by you or [the other deputy sheriff]?" He responded, "No. He provided his own transportation there."

Defendant's interrogation was conducted in a room at the sheriff's offices identified as the deputy's room. The deputy's room is located on the west side of the building. The doorway into the room is from an open hallway that leads to the front door of the building. It is also accessible from an east entrance to the sheriff's department through a communications room. The interrogation lasted about one and one-half hours.

According to the testimony presented, defendant was not arrested. He was not in handcuffs nor was he restrained from leaving the sheriff's offices. Prior to being questioned, defendant was told that he was not under arrest; "that he'd be leaving regardless of how the interview came out." The door that separated the deputy's room from the hallway was not locked. Defendant was not arrested at the conclusion of the interview.

Joe Dvorak was also at the sheriff's office the evening of March 14, 1989. Defendant and Dvorak were kept apart while they were in the sheriff's offices. Each was questioned separate from the other. At no time during the interrogation was defendant advised of the rights afforded him by *Miranda v. Arizona*, 384 U.S. 436 (1966).

John Blair summarized the events that occurred during the course of the interrogation as follows:

Q. And when he came in he was not Mirandized, is that right?

A. No, sir, he was not.

Q. Was he a suspect in any way.

A. Absolutely.

Q. He was a suspect.

A. Certainly.

Q. But he came in of his own free will and you asked him to make a voluntary statement, is that right?

A. I asked him to write a statement. I didn't say the word voluntary.

Q. Was it written on a voluntary statement form?

A. Right.

Q. But he wasn't Mirandized and told he was under arrest?

A. No.

Q. Wasn't told he was allowed to be silent or anything like that.

A. No, sir.

Blair testified that during the course of the interrogation, defendant was told that Dvorak had confessed to the crimes and that Dvorak had implicated defendant. Defendant then gave a written statement in which he admitted being at the scene of the crime but denied going into the building that was burglarized. Following further conversations with the deputy sheriffs, defendant admitted entering the premises but denied taking anything.

On May 12, 1989, a felony complaint was filed in the Associate Circuit Judge Division of the Circuit Court of Phelps County alleging that defendant committed the offense of second degree burglary. An arrest warrant issued and bond was set at $7,000. The record on appeal does not show the date of defendant's arrest. It does show, however, that defendant appeared before the Associate Circuit Judge Division of the Circuit Court of Phelps County on May 25, 1989; that a preliminary hearing was then scheduled for June 14, 1989; and that defendant, when he appeared on May 25, 1989, was committed to jail for failure to post bond. The legal file shows that bond was filed in that court June 2, 1989.

The issue presented by this appeal is whether the interrogation of defendant was a "custodial interrogation" so that the procedures required by *Miranda v. Arizona, supra*, were required to be followed. In *Miranda*, at l.c. 444, the U. S. Supreme Court stated:

> Our holding will be spelled out with some specificity in the pages which follow but briefly stated it is this: the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way [footnote deleted]. As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.

The footnote referenced in the material above quoted states, with regard to the explanation given of "custodial interrogation," "This is what we meant in *Escobedo [v. Illinois,* 378 U.S. 478 (1964)] when we spoke of an investigation which had focused on an accused."

In this case the trial court found that defendant's statement was the product of a custodial interrogation. In stating the ruling on the motion to suppress, the trial judge said:

> I do believe the essential element is was there a custodial interrogation going on, and that if where was a custodial interrogation, then I believe that it is still the state of the law that the Miranda rights must be given to the defendant. Now the case provided indicates that the mere coming to the police station in and of itself does not establish a custodial interrogation. The point that is very troubling to me in what happened in this case, other than the time factor which is thirty minutes to an hour to an hour and a half, comparing the cited case [*Oregon v. Mathiason*, 429 U.S. 492 (1977)] and the facts in this, is that the defendant first denied that he was involved in this matter. The other person was then questioned and at that time that person admitted they were involved in it. The police officers then clearly knew at that point in time that the defendant was a major suspect in the case, brought him back into the room, interrogated him, indeed, confronted him with the fact that the confession had been made. . . . However, the Court is going to have to rule that this was a custodial interrogation at the time the defendant made his statements.

In contending that no Miranda warning was required, the state relies on *Oregon v. Mathiason, supra*, as it did in opposing the motion to suppress in the trial court. In *Mathiason*, the criminal defendant was a parolee who the owner of a house that was burglarized had named when asked if she suspected anyone. He was a "close associate" of her son. After failing to contact Mathiason on three or four occasions, a police officer left his card at Mathiason's place of residence with a note for Mathiason to call him. Mathiason called and agreed to meet with the police officer. He was to go, and did go, to the state police office. that office was about two blocks from Mathiason's residence. Mathiason went there at 5:00 p.m., about an hour and a half after his telephone conversation with the police officer.

When Mathiason arrived at the state police office, the officer met him in the hall, shook hands and took him into an office. Mathiason was told that he was not under arrest, but that the officer wanted to talk to him about a burglary. The police officer told Mathiason that he believed Mathiason was involved in the burglary. Mathiason, after sitting for a "few minutes," admitted the offense. This occurred within five minutes after the officer had taken Mathiason into the office. The officer then advised Mathiason of his Miranda rights and took a taped confession. Mathiason was not arrested at that time. He left the state police office at about 5:30 p.m., approximately thirty minutes after his arrival. Criminal charges were later filed. Mathiason was tried before a court sitting without a jury and found guilty. Mathiason contended at trial and on appeal of his case that his confession should be suppressed "as the fruit of questioning by the police not preceded by the warnings required in *Miranda v. Arizona*." 429 U.S. at 942.

In a summary disposition, the Supreme Court found, by per curiam opinion, that there was no indication that the questioning took place in a context where Mathiason's freedom to depart was restricted. The court concluded "that Mathiason was not in custody 'or otherwise deprived of his freedom of action in any significant way.' " 429 U.S. at 495.

A similar result was reached in *California v. Beheler*, 463 U.S. 1121 (1983). As in *Oregon v. Mathiason, supra, Beheler* was a summary disposition in which the U. S. Supreme Court issued a per curiam opinion. The court, in *Beheler*, stated the question presented in that case as follows:

> The question presented in this petition for certiorari is whether *Miranda* warnings are required if the suspect is not placed under arrest, voluntarily comes to the police station, and is allowed to leave unhindered by police *after a brief interview*. (Emphasis added).

463 U.S. at 1121.

In *Beheler*, the defendant, Jerry Beheler, and several other persons attempted to steal hashish from a woman who was selling the controlled substance at a liquor store parking lot. When the woman resisted, she was killed by two of the participants. A short time later, Beheler called the police "who arrived almost immediately." Beheler told the police the identity of a person (a companion of Beheler's) who Beheler claimed had killed the victim; reported that his companions had hidden the gun in his back yard and consented to a search of the back yard. The gun that was used in the killing was found. Later that evening, Beheler voluntarily agreed to go to the police station. He was told he was not under arrest.

At the police station, Beheler agreed to talk to the police about the murder. Beheler was not advised of his Miranda rights. The interview lasted less than thirty minutes.[4] He was then permitted to leave. Five days later Beheler was arrested. He was then advised of his Miranda rights after which he gave a second taped confession. In that confession, Beheler admitted that his earlier interview with police, in which he had made statements relative to the offense, had been voluntary.

In the case now on appeal, the state argues that during the time the defendant was at the sheriff's office, his freedom was not restricted to an extent that he was rendered "in custody." The state says that the defendant was not subjected to custodial interrogation and, as in *Mathiason*, no Miranda warnings were required, thereby making any statements defendant gave admissible against him at trial. The state further points to *State v. Greathouse*, 627 S.W.2d 592, 594 (Mo. 1982), as authority for the proposition that a statement freely given by a person at a sheriff's office, but not under arrest or otherwise restrained of his liberty, is admissible albeit Miranda warnings were not given.

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[4]The opinion does not indicate what statements, if any, Beheler made to the police during the course of the interview at the police station.

In *Greathouse* a nephew of a missing man with whom the nephew lived, and who the nephew referred to as "dad," accompanied a deputy sheriff to the sheriff's office to assist the deputy in telephoning "the details of [the missing uncle's] absence to the Highway Patrol in Willow Springs for broadcast over their radio." *Id.* at 593. The nephew was told he did not have to go with the deputy sheriff unless he wanted to go. The nephew told the officer he would go. At the sheriff's office, the deputy sheriff told the nephew that the deputy had to first assist with feeding prisoners in the jail. Before that deputy sheriff returned, another deputy, Deputy Sheriff Jenkins, arrived at the office, went to the nephew, told the nephew that he (Jenkins) had been a good friend of the boy's "dad" a long time and expressed concern about the missing man. Jenkins asked the nephew to tell him where they could find the uncle. Deputy Sheriff Jenkins said to the nephew, "I'd like for you to tell me where we can find your dad because . . . [t]hat woman he went off with could have killed him or something." *Id.* at 594. The nephew broke down crying saying, "Lester, I shot him. I killed him and took him over on UU Highway." Deputy Sheriff Jenkins left the room. The deputy sheriff who had brought the nephew to the sheriff's office was told what had occurred. That deputy returned to the nephew, read his Miranda rights to him and took his statement.

In *Greathouse* the court pointed out, "By necessary implication, custodial interrogation does not exist where the person questioned is not in custody because he is not even a suspect in the crime, [citations omitted], or, even assuming that he was a suspect, where he is not under arrest or otherwise restrained of his liberty. [Citing *Oregon v. Mathiason*]." *Id.* The court noted that both of the circumstances it identified were absent in the case.

Greathouse is readily distinguishable from the case on appeal. In *Greathouse* that defendant was not a suspect. In this case the defendant was a suspect at the time he went to the sheriff's office.

Additionally, once the defendant in *Greathouse* became a suspect — when he told Deputy Sheriff Jenkins that he had shot his uncle — that defendant was given the Miranda warning before he was interrogated about the offense.

In *Greathouse, Mathiason* and *Beheler*, the Miranda warning was given at the time the criminal investigations had developed evidence that focused on the respective defendants. Once evidence was developed, the Miranda warning was given before proceeding to make further inquiries of those defendants. In *Mathiason* and in *Greathouse*, the Miranda warning was given promptly following the first incriminating statement of each defendant. In *Mathiason* this occurred within five minutes after that defendant had arrived at the state police office. In *Greathouse* the officer to whom defendant unexpectedly confessed immediately left the room. A second deputy came into the room and promptly read the Miranda warning to the defendant, then took his statement.

In *Beheler* that defendant was the one who first summoned police to the scene of the crime in which he had participated. Later in the evening, Beheler went to the police station knowing he was not under arrest. The police interviewed him. The opinion in *Beheler* is silent as to the nature of the interview. It does not indicate the extent, if any, that Beheler's statements were incriminatory either at the police station or earlier at the crime scene. Five days later, however, when Beheler was arrested, the police did advise Beheler of his Miranda rights. In a statement *made after* being advised of his Miranda rights, Beheler admitted that his prior statements were made voluntarily.

Also, in *Mathiason* and *Beheler* the interviews that occurred prior to the giving of the Miranda warning last "l/2-hour" in *Mathiason*, 429 U.S. at 495, and "less than 30 minutes" in *Beheler*, 463 U.S. at 1122. In this case, the defendant was at the

sheriff's office in an interrogation setting for an hour and a half during which sheriff's deputies alternated between two suspects (of which defendant was one) in different locations, using information obtained from one suspect to confront the other. Unlike in *Mathiason* and in *Beheler*, the defendant in this case was not given a Miranda warning during the course of the interrogation when the interrogating officers developed evidence clearly implicating him in the crime. The interrogation of this defendant continued without him being advised of his Miranda rights.

In *State v. Micheliche*, 220 N.J.Super. 532, 533 A.2d 41 (1987), and *State v. Raymond*, 305 Minn. 160, 232 N.W.2d 879 (1975), two other states addressed the issue that is presented in this case, viz., when does an interrogation of a suspect at a police station become custodial? Those cases are similar to *Mathiason* and *Greathouse* in that in *Micheliche* and *Raymond* noncustodial interrogations were in progress when, in each case, the person being questioned "blurted out" an admission that he committed the criminal act being investigated. In *Micheliche* the person being questioned was a suspect. In *Raymond* the person being questioned was not. Both interrogations occurred at police stations. Neither of those defendants was under arrest at the time the interrogations commenced. In *Micheliche* the incriminating statement was made approximately three hours after the declarant had voluntarily consented to answer questions. The court held in *Micheliche*, 533 A.2d 43-44, that until the defendant stated his admission of the crime, the interrogation was noncustodial in accordance with *Oregon v . Mathiason, supra*, but thereafter it became custodial. Because the Miranda warning was promptly given when the investigation became custodial, the defendant's statements given both before and after the Miranda rights were explained were admissible evidence.

In *Raymond*, 232 N.W.2d at 884, the court, in a distribution of controlled substance case, explained the effect of not giving the

Miranda warning immediately following that defendant's admission of guilt, saying:

> It should be noted that defendant was not asked a specific question when, on his initiative, he blurted out, "Well, I suppose I better tell you. He did get it from me." We feel that prior to this admission suspicion had not begun to focus on this defendant as a suspect for a particular crime. Without this element of suspicion, no warnings were needed. [Citation omitted.] At the point of the crucial admission, the Miranda warnings should have been given. Thus, the statements made immediately after this admission clearly should be excluded and the trial court ruled correctly as to these statements. However, the admissions and the questions and answers which had preceded it are admissible.

The court in *Raymond* went on to find that statements given at a later date, after appropriate Miranda warnings, were "not tainted as derivative of that portion of the statement improperly obtained on [the earlier date]."[5] 232 N.W.2d at 887.

As was acknowledged in *California v. Beheler*, 463 U.S. at 1125, the circumstances in each case influence a determination of whether a person is "in custody" in order to determine if the Miranda warning is required. In *Beheler* the court explained, nevertheless, that "the ultimate inquiry is simply whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest. [Citing *Mathiason*, [429 U.S.] at 495]."

In this case, the circumstances surrounding defendant's interrogation that makes it difficult to apply the language of *Beheler* and *Mathiason* is the unusual position taken by the sheriff's

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[5] The later statements in *Raymond* were excluded on other grounds. *State v. Raymond*, 232 N.W.2d at 887.

personnel with respect to their reason for trying to solve the crime they were investigating. The deputy sheriffs, although they suspected the defendant of the burglary and stealing offenses they were investigating, undertook to solve the crime in order to recover property that had been reported stolen rather than to attempt to bring criminal charges against the guilty parties. At the evidentiary hearing on the motion to suppress, only one of the deputy sheriffs who had participated in the interrogation of the defendant testified. On cross-examination, the former deputy sheriff was asked the following question and gave the following answer:

> Q. And did you instruct Mr. Zancauske that if items were recovered, charges would not be brought?
>
> A. I told him that night that as far as we had learned, the man just wanted his property back, that's correct.

At some later time, after they had obtained statements from defendant and from Dvorak, the law enforcement officers of Phelps County resumed the performance of the duty of charging suspects who they had reasonable cause to believe had committed crimes with the commission of those crimes. A criminal charge was filed against the defendant in this case.

This case illustrates the dilemma that was posed in a footnote to a dissenting opinion in *Mathiason*. There, Mr. Justice Marshall opined, "I trust today's decision does not suggest that police officers can circumvent *Miranda* by deliberately postponing the official 'arrest' and the giving of *Miranda* warnings until the necessary incriminating statements have been obtained." *Mathiason*, 429 U.S. at 499 n.5 (Marshall, J., dissenting).

It is our opinion that Miranda cannot be circumvented in this manner. *Mathiason* and *Beheler* are cases in which suspects made admissions of guilt to police officers in the course of interrogations at police stations that were not custodial at the

times the initial admissions were made. However, in each of those cases, at the time the police officers focused on the respective suspects — immediately in the case against Mathiason and five days later in the case against Beheler (who later, after being advised of his Miranda rights admitted that his earlier statements were given voluntarily) — the Miranda warnings were given before attempting to elicit further statements. This was when, in each of the cases, the police had reasonable grounds to believe that a crime was committed and reasonable grounds to believe that the defendant committed it. This is consistent with this court's holding in *State v. Pierce*, 556 S.W.2d 216, 218 (Mo. App. 1977).

In discussing when custodial interrogation begins, this court, in *Pierce, supra*, quoted from *State v. Tellez*, 6 Ariz.App. 251, 431 P.2d 691, 696 (1967), which stated with regard to *Escobedo v. Illinois, supra*, and *Miranda, supra*:

> To put the matter in familiar terms, the police must have both reasonable grounds to believe that a crime has been committed, and also reasonable grounds to believe that the defendant is the one who committed it. [Citation omitted.] We believe that the point where the warning must be given is when the two generally coincide, for from that point forward the police can be expected to pursue the case against the defendant with vigor. The police must have focused generally upon the crime so that they would have cause for arrest without a warrant . . . The time for caution is when the arrest could be made. Everything prior to that time may reasonably be considered "the general on the scene questioning" which is permissible . . . .

After this quotation from *Tellez*, this court added, "With this we agree." It concluded, under the facts of *Pierce*, that the Miranda warning had properly been given at the time a deputy sheriff involved in that case had reasonably begun to suspect that

defendant and had developed evidence that constituted probable cause for that defendant's arrest.

In this case, the defendant, Kurt Zancauske, was a suspect at the time he appeared at the sheriff's office, at the request of a deputy sheriff, for interrogation. During a one and one-half hour interrogation that involved deputy sheriffs going between the room where Zancauske was being questioned and another where the suspected co-conspirator, Joe Dvorak, was being questioned, defendant was informed that Dvorak had implicated him in the crime being investigated. The officers who were investigating the crime and who were interrogating the defendant had reasonably begun suspecting that the defendant committed the crime prior to the interrogation. However, it was when Dvorak admitted the crime and implicated defendant that the evidence the law enforcement officers had developed constituted reasonable grounds for arrest. At that point the interrogation became custodial notwithstanding that defendant had been told at the outset of the interrogation that he was not under arrest and was free to leave regardless of the outcome of the interrogation. That was the point when "the police [could] be expected to pursue the case against the defendant with vigor." *State v. Pierce, supra*, at 218. It was then that the Miranda warning was required. However, the Miranda warning was still not given. Thereafter, during further interrogation, defendant made incriminating statements, including the written statement to which the motion to suppress that is the subject of this appeal is directed. The trial court had sufficient evidence to find that those statements were the product of a custodial interrogation which was not conducted in accordance with the procedures required by *Miranda v. Arizona, supra*.

The trial court's order sustaining defendant's motion to suppress was supported by sufficient evidence. The order of the trial court sustaining the written Motion to Suppress Statements in

case no. CR590-1FX in the Circuit Court of Pulaski County is affirmed.

JOHN E. PARRISH, Presiding Judge

Flanigan, C.J., and Shrum, J., concur

APPENDIX B

569.170. Burglary in the second degree.—

1. A person commits the crime of burglary in the second degree when he knowingly enters unlawfully or knowingly remains unlawfully in a building or inhabitable structure for the purpose of committing a crime therein.

2. Burglary in the second degree is a class C felony.

APPENDIX C

547.200. Appeal by state.—1. An appeal may be taken by the state through the prosecuting or circuit attorney from any order or judgment the substantive effect of which results in:

(1) Quashing an arrest warrant;

(2) Suppressing evidence; or

(3) Suppressing a confession or admissions.

* * *

3. The appeal provided in subsection 1 of this section shall be an interlocutory appeal, filed in the appropriate district of the Missouri court of appeals unless the proceedings involve a charge of capital murder or murder in the first degree, pursuant to the provisions of section 565.001 or 565.003, RSMo, in which case notices of appeal shall be filed in the supreme court of Missouri.

* * *.

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LIST OF PARTIES

The State of Missouri is the Petitioner in this cause because it seeks review of an interlocutory appeal by the Missouri Court of Appeals, Southern District. The State of Missouri was the appellant before the Court of Appeals. Kurt Zancauske is the respondent. He had been charged by the State of Missouri with the Class C felony of burglary in the second degree.

QUESTIONS PRESENTED

1. Does the Supreme Court of the United States have jurisdiction under 28 U.S.C. Sec. 1257 where a final order has not been rendered because the case involves the appeal of an interlocutory order?

2. Does the Supreme Court have jurisdiction under 28 U.S.C. 1257 where a final order has not been rendered by the highest state court where a decision may be had?

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No._____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

STATE OF MISSOURI

Petitioner,

vs.

KURT ZANCAUSKE,

Respondent.

Petition for Writ of Certiorari to the
Missouri Court of Appeals, Southern District

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

On March 7, 1991, the Missouri Court of Appeals, Southern District, affirmed an order of the trial court suppressing respondent's alleged statements to sheriff's deputies in the case styled State of Missouri v. Kurt Zancauske, No. 17,115. The opinion is now reported at State v. Zancauske, 804 S.W.2d 851 (Mo.Ct.App. 1991), and has been reproduced in its entirety in Appendix A of the State of Missouri's Petition for a Writ of Certiorari.

JURISDICTIONAL STATEMENT

The State of Missouri seeks review of the decision of the Missouri Court of Appeals, Southern District, issued on March 7, 1991. State of Missouri v. Zancauske, 804 S.W.2d 851 (Mo.Ct.App. 1991).

Petitioner cannot request jurisdiction under 28 U.S.C. sec. 1257(3). The Supreme Court of the United States does not have jurisdiction in this case because a final order has not been rendered by the highest state court in which relief may be had.

CONSTITUTIONAL PROVISION INVOLVED

Amendment V, U.S. Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTORY PROVISIONS INVOLVED

The statute under which the respondent was charged, MO.REV.STAT. sec. 569.170. (1986), is set forth in full

under Appendix B of the State of Missouri's Petition for Writ of Certiorari. The statute authorizing the State to appeal from the trial court's order sustaining the respondent's pre-trial Motion to Suppress, MO.REV.STAT. sec. 547.200 (1986), is set out, in pertinent part, in Appendix C of the State of Missouri's Petition for a Writ of Certiorari.

STATEMENT OF THE CASE

A. Procedural History

The respondent, Kurt Zancauske, was charged by an information filed in the Circuit Court of Phelps County, Missouri, 25th Judicial Circuit, with burglary in the second degree in violation of MO.REV.STAT. sec. 569.170 (1986). State v. Zancauske, 804 S.W.2d 851, 852 (Mo.Ct.App. 1991). Prior to his scheduled trial, the respondent filed a motion seeking to suppress certain written statements he had made to deputy sheriffs at the Phelps County Sheriff's Department during questioning at that office which took place on March 14, 1989. Id., 804 S.W.2d at 852.

Following an evidentiary hearing, the trial court sustained the motion, ruling that the sheriff's deputies were required to have advised the respondent of the rights afforded him by Miranda v. Arizona, 384 U.S. 436 (1966). Id. The trial judge sustained the Motion to Suppress because, among other reasons, a suspected accomplice, who was being questioned seperately but simultaneously by the same sheriff's deputies, had implicated the respondent in

the burglary and stealing. State v. Zancauske, supra, 804 S.W.2d at 854.

The State perfected an interlocutory appeal pursuant to MO.REV.STAT. sec. 547.200 (1986), and on March 7, 1991, the Missouri Court of Appeals, Southern District, upheld the trial court's order suppressing the respondent's statement. 804 S.W.2d at 851, 852. On March 15, 1991, Special Prosecutor Edward D. Hoertel filed a nolle prosequi in the Circuit Court of Pulaski County.

B. Statement of Facts

On March 14, 1989, Deputy Michael Barnes of the Phelps County Sheriff's Department asked the respondent Kurt Zancauske to come to the Phelps County Sheriff's Department. (T.3) The respondent complied, as did Joseph Dvorak. (T.3) The respondent and Dvorak had been working together, felling and hauling timber adjacent to property owned by Nolan Dunlap. (T.75)

After the respondent and Joe Dvorak both arrived at the Sheriff's Department, they were seperated. Deputy John Blair testified that at that point in time, that respondent was considered a suspect in a burglary of a cabin on the Dunlap property. (T.10,11) Defendant was placed in the deputy's room of the Phelps County Sheriff's Department. (T.3) The deputy's room in the Sheriff's Department is in the back of the building, which has two front exits. (T.5,6) To go from the deputy's room to the west exit, the respondent would have had to walk down a hallway;

to leave from the east exit, respondent would have had to walk past the dispatcher's room, at which a member of the Phelps County Sheriff's Department is stationed. (T.5,6)

Respondent was questioned by Deputy Sheriff Michael Barnes and John Blair at the same time. (T.6) Initially, respondent denied any knowledge of a break-in of a cabin on the Dunlap property. (T.7) Co-defendant Joe Dvorak also initially denied any knowledge of the break-in. (T.12) The deputy sheriffs then went back to the co-defendant, who confessed to a break-in and implicated the respondent. (T.12) When the deputies returned to respondent in the deputy's room, they told respondent that the co-defendant had just confessed to breaking into the cabin on the Dunlap property. (T.12)

Respondent then wrote out a statement admitting he had been on the Dunlap property, had gone up to the cabin, and had looked in the cabin's windows. (L.F.29) In the written statement, respondent denied entering the cabin or taking anything from it. (L.F.29) After the deputy sheriffs told respondent that it would be best if the cabin's owner got his property back, the respondent indicated he would try to get the property back to the owner. (T.63) Respondent also orally admitted that he had gone into the building. (T.4)

Deputy Sheriff John Blair told respondent before the questioning began that respondent was free to leave no matter how the interview came out. (T.4) However, respondent remained at

the Phelps County Sheriff's Department for an hour and a half. (T.16) Respondent did not leave the Sheriff's Department before having made a written statement. At trial, the State stipulated that at no time on or before March 14, 1989, was respondent advised that he had the right to remain silent or to secure counsel. (T.13)

Respondent filed a motion to suppress any written statements allegedly made by defendant. (L.F.53,54) The hearing on this motion was conducted on August 13, 1990. (T.1) The Court, having heard the testimony of former Deputy Sheriff John Blair, sustained respondent's motion to suppress the written, but not the oral, statements allegedly made by respondent. (T.19-21)

The jury was then brought back into the courtroom, and sworn in. Evidence was heard from two State's witnesses, Nolan Dunlap and Joseph Dvorak. (T.24-53) The third witness for the State's case-in-chief was John Blair, the former deputy sheriff who had testified at the hearing on the motion to suppress written statements made by respondent. When John Blair began to testify as to the questioning of respondent at the Phelps County Sheriff's Department, counsel for respondent objected. (T.59)

The Court having sustained the objection, the State requested that John Blair's testimony be heard outside the presence of the jury as an offer of proof. (T.59) After direct and cross-examination, respondent requested that any written or oral

statements allegedly made by respondent be suppressed on the grounds that respondent had not been advised of his rights. (T.68) The Court sustained respondent's motion. (T.68)

The State of Missouri filed an interlocutory appeal pursuant to MO.REV.STAT. sec. 547.200 (1986). The Court of Appeals affirmed the trial court's decision to suppress written statements allegedly made by the respondent. State v. Zancauske, 804 S.W.2d 851, 859 (1991). In addition, the Court of Appeals ruled that the State of Missouri could not appeal the suppression of any oral statements allegedly made by the respondent because MO.REV.STAT. sec. 547.200 (1986) only granted the State of Missouri the right to appeal pre-trial evidentiary rulings. 804 S.W.2d at 852.

REASONS FOR DENYING A WRIT

I. THE SUPREME COURT DOES NOT HAVE JURISDICTION IN THIS CASE BECAUSE A FINAL JUDGMENT OR DECREE HAS NOT BEEN RENDERED BECAUSE THIS CASE INVOLVES THE APPEAL OF AN INTERLOCUTORY ORDER.

The State of Missouri is not permitted to appeal any decision of a trial court unless such ability has been conferred by statute. State v. Reed, 770 S.W.2d 517, 519 (Mo.Ct.App. 1989). Missouri Revised Statutes sec. 547.200.1(3) allows the State to appeal "from any order or judgment the substantive effect of which results in...[s]uppressing evidence." An appeal under this statute is an interlocutory appeal. MO.REV.STAT. sec. 547.200.3 (1986).

The Supreme Court of the United States cannot assert jurisdiction in this case because an interlocutory appeal is not a final order. The Supreme Court's jurisdiction to review decisions of state courts may only include "[f]inal judgments or decrees..." 28 U.S.C. sec. 1257. Where a trial court suppressed evidence because the court had not conducted a hearing to determine whether evidence was obscene, and the court of appeals reversed the trial court's decision and remanded for trial, and the state supreme court denied a hearing, the United States Supreme Court denied certiorari because the order was not final. Chapman v. California, 405 U.S. 1020 (1972).

Finality of orders is determined by a practical, rather than a technical, construction. Cohen v. Beneficial Loan Corp., 337

U.S. 541, 546 (1949). One consideration is whether a "significant question of fact or law remains for trial..." Chapman v. California, 405 U.S. at 1020. If significant questions remain, then in the interest of judicial economy it makes little sense to decide an interlocutory matter, only have to the matter again appealed after another trial. Id.

In this matter, significant questions do remain. The statements sought to be introduced by petitioner were not the only evidence sought the state to be introduced at trial. The state also introduced the testimony of two deputy sheriffs who investigated the case, the alleged victim of the burglary, and the respondent's alleged co-defendant. In fact, enough significant questions of law and fact remained at trial that the state proceeded to try the case against respondent, and did not request that the trial be stayed pending the appellate court's decision on the admissibility of respondent's alleged statements.

Respondent anticipates that if this Court reverses the decision of the Missouri Court of Appeals, Southern District, then the case will be retried. Although the State of Missouri field a nolle prosequi with respect to the charge of burglary in the second degree, the charge could be refiled. Counsel for respondent believes this case would be retried because of the State of Missouri's persistence in seeking to have the statements admitted. If petitioner is again tried on these same charges,

then the question of the admissibility of these alleged written statements will most likely be grounds for relief in a Motion for New Trial and subsequent appeal. This Court may then again be asked to rule on the admissibility of the statements the state seeks to have introduced.

B. THE SUPREME COURT ALSO DOES NOT HAVE JURISDICTION IN THIS CASE BECAUSE A FINAL ORDER HAS NOT BEEN RENDERED BY THE HIGHEST STATE COURT WHERE A DECISION MAY BE HAD.

The United States Supreme Court cannot assert its jurisdiction on a writ of certiorari unless a final judgment or decree has been rendered by "the highest court of a state in which a decision could be had..." 28 U.S.C. sec. 1257. In petitioner's jurisdictional statement, counsel for petitioner states that he claims jurisdiction under 28 U.S.C. sec. 1257(3) and Rule 13.1 of the United States Supreme Court. Rule 13.1 allows a party to seek review of a judgment of a lower state court which is subject to discretionary review by the state court of last resort, but only after the state court of last resort has denied discretionary review.

If a party wishes to transfer a case to the Missouri Supreme Court for review of an appellate decision, that party must, among other things, send a copy of any application for transfer to all parties. Supreme Court Rule 83.07. Respondent's counsel has not received any copy of application for transfer to the Missouri Supreme Court from either the Missouri Office of the Attorney

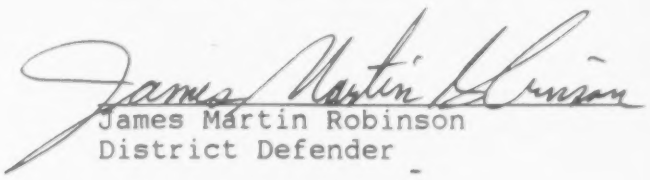
General or the Prosecutor of Phelps County, Missouri. In addition, petitioner's counsel has not received any notice from the Missouri Supreme Court that transfer in this case was denied.

Petitioner explains his failure to request the Missouri Supreme Court to review this decision by explaining that "it is highly unlikely that a motion for discretionary review addressed to Missouri Supreme Court would have been successful." Petitoner's Petition for a Writ of Certiorari at 16 n.3, State of Missouri v. Zancauske, No. 90-1879. In addition, counsel also explains that the Missouri Attorney General's Office did not motion for discretionary review because at the time the case was being handled by Special Prosecutor Edward D. Hoertel. Id. Neither reason removes the State of Missouri's responsibility, whether represented by a special prosecutor or the Missouri Attorney General's Office, from presenting a final order or decree from the highest state court in which a decision could be had to the United States Supreme Court for review.

CONCLUSION

For the reasons stated herein, the State of Missouri's Petition for a Writ of Certiorari to the Missouri Court of Appeals, Southern District should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the
foregoing document upon the attorney of record in the
cause by mailing a true copy thereto to the attorney of record
his business address as disclosed by the pleadings of record
herein with postage fully prepaid and by depositing same in the
United States mails at Rolla, Missouri, this 14th
day of January, 1976.

James Martin Robinson

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